No. 17-587

IN THE

Supreme Court of the United States

MOUNT LEMMON FIRE DISTRICT,
Petitioner,

v.

JOHN GUIDO AND DENNIS RANKIN,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

While claiming that their reading flows from statutory text, Respondents sure take a lot of liberties.

There are the elisions. Respondents urge the Court not to "concern itself" with the word "person" in § 630(b)'s person-based definition of "employer." Respondents resist the attention to "person" because they cannot deny the word traditionally encompasses political subdivisions, thus subjecting such entities to the employee minimum. Then, Respondents elide the agent clause smack in the middle of the text they are reading. They have no choice, because they can offer no reading of the word "agent" in that clause that is remotely plausible.

Which brings us to the distortions. Most notably, Respondents propose the word "agent" in the critical second sentence of § 630(b) might possibly mean "independent contractor." Never mind that the two are not synonyms, and are often contradictory. Never mind that no court (or dictionary) has ever adopted that definition. Respondents have to offer this Court some way to avoid a result they tacitly concede would be as disastrous as it is preposterous: Under their reading, any employee who makes or implements personnel decisions is personally liable as an employer, subjecting her to independent liability.

Then there are the contradictions and anomalies. Respondents do not deny that their reading places public and private entities on unequal footing, and places the ADEA out of step with its sister antidiscrimination statutes, Title VII and the Americans

with Disabilities Act (ADA). But Congress expressed its intention to bring accord on both dimensions. And Respondents offer no plausible explanation of why Congress would have singled out the ADEA as the only discrimination statute (not to mention the Fair Labor Standards Act (FLSA)) to treat political subdivisions more harshly than private enterprises.

When a party needs to contort that much to support its statutory construction, something must be wrong. Here, what is wrong is the failure to heed this Court's admonition that "[s]tatutory language cannot be construed in a vacuum." *Sturgeon v. Frost*, 136 S. Ct. 1061, 1070 (2016) (quotation marks omitted). The only reading that is faithful to the statutory text—all of it—and context is that political subdivisions are subject to the ADEA's employee minimum.

ARGUMENT

I. The ADEA's Text, Context, And Statutory History Establish That § 630(b)'s 20-Employee Minimum Exempts Small Political Subdivisions.

Respondents recognize that the essential "inquiry" in this case is how the second sentence of § 630(b) relates to the first: Does it "*add* a new category" of employers or "merely *clarify*" the preceding definition? RB10.[1] But rather than taking the most straightforward path through the relevant language, Respondents plot a course that looks like Pac-Man

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[1] We abbreviate Brief for Petitioner "OB," Brief for Respondents "RB," and Brief for the United States "GB."

running from ghosts: Start at the word "means" in the first sentence, but then avoid the rest of that sentence until you get to "also means" in the second, RB9-12; slip around the agent clause in the second sentence, and proceed to the governmental clause there, RB13-14; then swing back around to the defined term "person" in the first sentence, RB15-20, meander for a while, and only then turn back towards the elided agent clause to check it off the list, RB31-36.

We will stick with the direct route. We construe the words of the statute in the order in which they appear, §§ A-B, and then address additional interpretive principles that favor our reading, § C. As explained in the opening brief (at § I), the text, context, and statutory history, in addition to other interpretive principles, establish that the employee minimum applies to political subdivisions.

A. Section 630(b)'s first sentence defines "employer" expansively to include political subdivisions, but only those with at least 20 employees.

Respondents do not contest that § 630(b)'s first sentence is the baseline definition of "employer" to which the subsequent governmental clause relates. But they dispute the natural legal conclusion: that the first sentence is therefore vital "context" in which the governmental clause must be "placed." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). They also question our takeaway from the first sentence: that it embraces political subdivisions through the word "person," so that the baseline definition of "employer" encompasses only those political

subdivisions that have at least 20 employees and affect commerce.

1. Respondents' first rejoinder is unconventional at best: They urge this Court to ignore the term "person" in § 630(b)'s first sentence entirely. They deride any consideration of the statutory definition in § 630(a) as "highly unnatural." RB15. In their view, if you ignore the definition of "person" and skip to the governmental clause, you learn everything you need to know about governmental entities—including, Respondents say, that there is no employee minimum. RB10-15.

Referencing a statutory definition is not "unnatural," RB15—it is mandatory. This Court routinely pauses on defined terms to plug in their definitions, just as we have done here, before interpreting the remainder of the text. *See, e.g.*, *Quern v. Mandley*, 436 U.S. 725, 742-43 (1978). To do otherwise is to impermissibly construe "isolated provisions" instead of "statutes." *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010).

Respondents cannot justify their disregard of the word "person" with their stylized hypothetical about "special fans," "boosters," and "faculty." RB15-16. Like the Ninth Circuit's hypotheticals about numbers and banks, *see* Pet. 27-29, theirs merely shows that there are contexts where the words "also means" would obviously be additive. Stylize a different hypothetical and context points in the other direction. Suppose a ticket at Respondents' stadium promises

"Admission to the College Club for University-Affiliated Ticketholders," and the fine print says: "The term 'University-Affiliated Ticketholder' means any person with a University ID. It also means faculty, but does not mean staff." It doesn't take a quantum physics professor to figure out that faculty are covered "persons" required to show ID.

Is that a peculiar hypothetical? Of course—so are Respondents' and the Ninth Circuit's. And § 630(b) is a peculiarly drafted statute. But that is all the more reason to follow tried-and-true interpretive methodologies, considering each word in its context. And for the governmental clause, the first sentence—and particularly, the word "person"—provides critical context.

2. So do Respondents think a political subdivision is a "person" within the meaning of the first sentence or not? They won't say. We explained that the answer must be yes for two independent reasons, OB20-21, which Respondents fail to refute.

First, this Court has construed the term "person" to encompass political subdivisions in a wide range of statutes, even when undefined. To this, Respondents offer only the below-the-line suggestion (RB18 n.3) that this Court could ignore most of those cases because they postdate the ADEA. That is not how it works. All but one of the *statutes* this Court was interpreting in those cases predate the ADEA. So the cases construing the word "person" in those statutes confirm that Congress has used it to embrace political subdivisions for a century.

Second, the expansive definition of "person" in § 630(a) compels the same result here. Respondents offer that political subdivisions are "more readily conceived" in other terms, like "geographical construct." RB18. The same could have been said about the term "person" in other statutes. It did not move the result there, and it certainly doesn't here, where the definition's catchall broadly refers to "*any* organized groups of persons." Respondents do not dispute our point (OB21) that this Court gives "the word 'any' ... an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 219 (2008). That would include *all* organized groups of persons—even those "readily conceived" in alternative language. Respondents also ignore that "person" includes "corporations" and "associations," eliminating any doubt that the scope of t[illegible] catchall reaches political subdivisions. OB21-22.

Similarly, Respondents do not deny another direct textual point: If "person" did not include public entities, there would have been no reason to exclude federal entities from the person-based definition of "employer"—and no reason to exclude state and local entities from the original version. OB22-24.

3. Respondents combine with the Government to present a pu-pu platter of canons that they contend undermine the text. It underwhelms.

First, Respondents attempt to narrow § 630(b)'s first sentence by invoking the canon that specific provisions supersede general ones. RB17-18; *see* GB16. They say that "[t]he word 'person' ... is indisputably more general than ... 'political subdivisions.'" RB17.

This, Respondents argue, requires a narrow construction of the word "person," so as not to "blunt the rules established for political subdivisions" in the second sentence. RB17-18. But that begs the question. The argument assumes that the second sentence adds political subdivisions as a separate category and creates different "rules" for them. If, as we maintain, the second sentence clarifies what is already contained in the first sentence, there is no conflict to resolve, and thus no need for the specific-general canon.

Further, even *accepting* Respondents' unwarranted assumption, the coverage of certain political subdivisions under § 630(b)'s first sentence would not "blunt" the governmental clause. The governmental clause would simply extend the baseline coverage of public entities established by § 630(b)'s first sentence. There is no contradiction.

Second, the Government (but not Respondents) argues that the *noscitur a sociis* canon restricts § 630(a)'s catchall provision to the private sphere because it "appears at the end of a list of private entities." GB16. Not so. This Court (and dictionaries) consistently defines two terms in § 630(a)'s list, "corporations" and "associations," to include public entities. OB21-22.

Third, the Government (but not Respondents) notes that "[t]he term 'person' presumptively excludes States or state instrumentalities." GB16 (citing *Vt. Agency of Nat. Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780-81 (2000)). That presumption "may be disregarded" upon "some affirmative showing of statutory intent to the contrary." *Stevens*, 529 U.S. at

781. There are several such showings here. Foremost is the capacious text of § 630(a), including its catchall and reference to "corporations" and "associations." This Court considered a similar statutory definition in *Georgia v. Evans* and concluded that it embraced States, overcoming any contrary presumption. 316 U.S. 159, 162-63 (1942). And § 630(b)'s statutory history confirms that Congress understood "person" to include States and subdivisions from the start: That is why it felt the need to exclude both explicitly from coverage. *See Stevens*, 529 U.S. at 783 n.12 (considering statutory history).

In the end, all these arguments about background presumptions and potential ambiguities only prove our central thesis: When Congress drafted this statute, there were grounds for uncertainty. Congress needed to be crystal clear about which governmental entities are included as employers, and which are not—hence a clarifying clause. This fully answers Respondents and the Government's final resort to the canon against superfluity. Respondents argue that if "the ADEA's definition of 'person' encompassed political subdivisions, then Section 630(b)'s explicit treatment of political subdivisions would be pure surplusage." RB18; *see* GB17. On the contrary, as we have explained (OB33), it operates as a crucial this-but-not-that clause, avoiding any doubt as to precisely which governmental entities § 630(b)'s capacious, person-based definition includes. As the Government elsewhere concedes, "remov[ing] any doubt" in this way is a meaningful, non-redundant statutory function. GB17 (citing *Ali*, 552 U.S. at 226).

4. Finally, Respondents note that when Congress added coverage for political subdivisions to Title VII in 1972, it explicitly placed them in the definition of the word "person." Respondents argue that because Congress did not do it that way in the ADEA, it must have meant to omit political subdivisions from the definition. RB20-21. We have already explained that "Title VII started with a narrower definition of 'person' than the ADEA," so "it is only natural that [the two statutes] took a different route to the same place," OB52-53. To borrow Respondents' phrase, Congress was not "confined" to amending the ADEA "using only words" previously chosen for Title VII. RB22.

B. The second sentence clarifies what is included in the first sentence's definition, without adding new categories of employers.

1. We now turn to the text and structure of § 630(b)'s second sentence to determine its relationship to the first. We start with an important clarification. Respondents incorrectly assert that "[t]he Fire District does not dispute that the text of Section 630(b)'s political subdivision clause itself indicates that the statute's numerosity requirement does not apply to political subdivisions." RB14. We most certainly do. As Respondents elsewhere acknowledge (RB10-11 & n.1), we invoked none other than the Oxford English Dictionary to demonstrate that the critical phrase —"also means"—can signal "clarification, rather than addition"; it can mean "includes" or "incorporates." OB18. Respondents nowhere dispute

that the phrase *can* bear that meaning, which makes the sentence (standing alone) ambiguous.[2]

One key to discerning which meaning applies is a point Respondents concede. Section 630(b)'s second sentence contains the agent clause and the governmental clause. Both clauses are introduced by the same transitional phrase, "also means." And Respondents agree (RB32) that however the words "also means" are construed with respect to the governmental clause, those same words must mean the same thing for the agent clause.

The agent clause decisively favors clarification over addition. Respondents concede that under their reading, "'agents' of covered private employers constitute an additional category of 'employer.'" RB32 (quoting OB28). But that result is unfathomable. The most common agents of an employer are its employees. That reading would impose unprecedented personal liability for discrimination on supervisors, human resources managers, and other employees who act as agents for their employers in making and carrying out employment decisions. Those employees could face personal liability for a colleague's retroactive salary—or even millions in damages for a class of employees. Such extraordinary liability simply cannot be squared

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[2] Respondents (RB13-14) claim support from *Johnson v. Mayor of Baltimore*, 472 U.S. 353 (1985), and *EEOC v. Wyoming*, 460 U.S. 226 (1983). But neither decision analyzed the question here, and before the Ninth Circuit here, every court that had done so adopted our reading.

with a statutory scheme that deems a 19-person company too small to penalize. OB28-30.

Every circuit to read the agent clause has found it does something more sensible: It clarifies that the statute incorporates principles of vicarious liability. In simple terms: It says that the employers described in the first sentence are responsible, as principals, for any acts agents take on their behalf. OB30. The same is true for the identical agent clause in Title VII. *Id.* This Court so held in *Burlington Industries, Inc. v. Ellerth*, which concluded that Title VII's agent clause is "an explicit instruction" to apply "agency principles" of vicarious liability to covered employers. 524 U.S. 742, 754 (1998).

If the ADEA's agent clause merely clarifies the scope of liability for employers described in the first sentence, the adjacent governmental clause must have the same function: It clarifies, not adds.

2. Like the Ninth Circuit, Respondents initially skip the agent clause entirely. It appears nowhere in Part I of their brief, which lays out their reading of the ADEA's "text" and "structure." Instead, the clause surfaces for the first time on page 31, labeled as a "consequentialist" rather than textual concern. RB25, 31. But that clause, appearing smack in the middle of the relevant text in this case, is unavoidable—and Respondents' attempts to avoid it speak volumes.

When Respondents finally turn to the agent clause, they torture it. They recognize that to prevail, they must argue that the agent clause adds *some* new category of employer who is separately liable. But

they also recognize that Congress would never have made all employees (who are quintessential "agents") independently liable for age discrimination undertaken at an employer's behest. So they rewrite the clause—and then duck. The rewrite: The phrase "agent of such a person" means "third-party independent contractors." RB32; *see* GB19. The result, Respondents contend, is that these independent contractors are directly liable for discriminating against their clients' employees. RB32; *see* GB19. Then, the duck: They urge this Court not to resolve "whether individual employees—such as supervisors or human resource managers—are *also* swept in by the agent clause." RB33; *see* GB20-21. Neither maneuver works.

a. Respondents offer no reason to redefine "agent" as "third-party independent contractors." Those terms are far from synonymous. By definition, an "[a]gent" "act[s] on" another person's "behalf" and is "subject" to their "control." Restatement (Second) of Agency § 1. An "[i]ndependent contractor," by contrast, is defined by the *absence* of such control: It means someone "entrusted to undertake a specific project but who is left free to do the assigned work and to choose the method for accomplishing it." *Independent Contractor*, Black's Law Dictionary (10th ed. 2014). In light of that distinction, "[c]olloquial use ... excludes independent contractor from the category of agent." Restatement (Second) of Agency § 14N cmt a.

Even if "agents" could be narrowed to "third-party independent contractors," Respondents are wrong to

suggest that there is precedent for holding such entities personally liable. RB32. Respondents purport to draw that rule from outdated decisions from three circuits. *Id.* (citing *Morgan v. Safeway Stores, Inc.*, 884 F.2d 1211 (9th Cir. 1989); *Williams v. City of Montgomery*, 742 F.2d 586 (11th Cir. 1984); *Spirt v. Teachers Ins. & Annuity Ass'n*, 691 F.2d 1054 (2d Cir. 1982)). But none held an independent contractor personally liable for discrimination under the agent clause. And each of those circuits has since clarified that agents under the ADEA are *not* employers in their own right; they merely trigger vicarious liability for their principals. *See Martin v. Chem. Bank*, 129 F.3d 114, at *3 (2d Cir. 1997) (unpublished); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993).

Respondents (RB32) and the Government (GB19) mistakenly rely on *City of Los Angeles Department of Water & Power v. Manhart* as recognizing their theory that independent contractors can be independently liable. 435 U.S. 702 (1978). It didn't. *Manhart* suggests only that Title VII's agent clause would impose *vicarious* liability on a "covered employer" that sought to "avoid[] *his* responsibilities by delegating discriminatory programs to corporate shells." GB19 (quoting *Manhart*, 435 U.S. at 718 n.33) (emphasis added; alteration omitted). Of course, that is exactly what *Burlington*, 524 U.S. at 754, held. *Supra* 11. Both cases support *our* reading—when Congress speaks of "agents," it means to clarify, not add.

b. What Respondents duck is the critical flaw in their reading of the agent clause: If, as they insist,

"'agents' of covered private employers constitute an additional category of 'employer'" that is separately liable for monetary damages, then that must be true of all "agents." Respondents do not deny that employees are the quintessential "agents" of employers. *See* Restatement (Second) of Agency § 2. That must mean that, under their reading, every employee who makes or implements employment decisions is personally liable for damages. OB28-29.

Respondents cannot refute the logic of this conclusion. Nor can they deny that this would be revolutionary—even catastrophic. They do not suggest why Congress would ever want to do that, or why it would do it so obliquely. They just punt: Because Respondents' tortured reading is "enough to give independent meaning to the [agent] clause," they assert, "this Court need not decide here whether individual employees" are covered. RB33; *see* GB20-21.

In the interest of winning this case, Respondents are walking this Court directly into the brick wall. The fact that there is no way around that wall is proof positive that Respondents' reading of the sentence is wrong. That conclusion is foundational, not "peripheral," GB20.

c. Respondents' and the Government's remaining arguments are meritless.

Respondents mistakenly suggest that reading the agent clause, as we do, to clarify that traditional principles of agency liability apply "would allow employers an end run around the statute." RB36. This Court did not share that concern in *Burlington*. With good

reason: By clarifying that employers are vicariously liable for the acts of their agents—without actually imposing independent liability on those agents—§ 630(b)'s agent clause *prevents* employers from avoiding liability through delegation. *See Burlington*, 524 U.S. at 754-55; *Manhart*, 435 U.S. at 718 n.33.

The Government is similarly mistaken in asserting that our reading of the agent clause requires agents to have at least 20 employees. GB20. It does not. Under our reading, the agent clause clarifies that a *qualifying "person"* with at least 20 employees is vicariously liable for acts by agents *of any size*.

3. We return then to Respondents' concession (RB32) that the words "also means" have the same meaning in both the governmental clause and the agent clause. Since those words as applied to the agent clause signal clarification of the preceding sentence—not a new category of independently liable employers—the same must be true of the governmental clause. As all other circuits to address the issue have held, it further clarifies the definition of "employer" in § 630(b)'s first sentence by specifying that only state and local governmental entities are subject to coverage, while federal entities are categorically excluded. OB9, 31-35. That is an important distinction—one that marked a substantial change from the original version of the statute. *See* OB24, 35-36.

As noted, Respondents do not dispute that "also means" may signal clarification. This is not hypothetical: Congress has used the words that way in other statutes. *E.g.*, 15 U.S.C. § 6809(9) ("consumer" "also means" the consumer's "legal representative," even

though the representative's personal information is not independently entitled to statutory protection). Instead, Respondents argue only that Congress "typically uses the phrase" in its additive sense instead, citing several statutes as examples. RB12. But those statutes differ from § 630(b) in both text and context. Take 15 U.S.C. § 1471(3) and 12 U.S.C. § 1715z-1(i)(4)—the two examples that Respondents highlight. They contain no employee minimum; no mention of "person"; no agent clause or attendant possibility of vicarious liability; and no phrase modified by "also means" that—like the governmental clause—distinguishes between what the statute includes and excludes. So while they show that "also means" can signal an additional category, they shed little light on the meaning of that phrase in § 630(b).

"[I]n law as in life, ... the same words, placed in different contexts, sometimes mean different things." *Yates v. United States*, 135 S. Ct. 1074, 1082 (2015) (plurality opinion). This Court has repeatedly departed from the "typical" meaning of a statutory term where context so requires. *See* OB33-34. The ADEA's text and context compel the same result regarding "also means" in § 630(b).

C. Two interpretive principles resolve any ambiguity in favor of applying the minimum-employee requirement.

If there were any lingering ambiguity, two canons of construction would resolve it in the Fire District's favor.[3]

1. Respondents (RB36) concede that courts may not read statutes to override the "usual constitutional balance of federal and state powers" where Congress has not clearly expressed its intention to do so. *Bond v. United States*, 134 S. Ct. 2077, 2089 (2014); *see* OB37. They do not dispute that their reading constrains state power in two ways: (1) by constricting hiring and firing decisions at small state agencies, thereby reducing States' "power to define the qualifications of their officeholders," *Gregory v. Ashcroft*, 501 U.S. 452, 468 (1991); and (2) by overriding state judgments as to what sized agencies and political subdivisions can tolerate the burdens of age-discrimination liability. OB37-38. Rather, Respondents argue that these are not the sorts of federal intrusions that implicate the clear statement rule.

In support, Respondents and the Government cite *Jinks v. Richland County*, 538 U.S. 456 (2003). RB37;

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[3] Respondents' halfhearted invocation of *Skidmore* deference (RB24-25) falls short. The EEOC has never offered a reasoned analysis of the meanings of "person" or "agent" under § 630, or how to square those terms with the governmental clause. It thus has not offered a persuasive reading of the governmental clause "in [its] context," as this Court requires. *Sturgeon*, 136 S. Ct. at 1070.

GB27. But *Jinks* held only that Congress was not required to specify in "unmistakably clear" language that a federal law suspends state-law limitations periods in suits against local governments. 538 U.S. at 466. The reason was that state entities were *not* implicated by the question presented. Where suits against state entities were concerned, this Court had *already required* an "unmistakably clear" statement in *Raygor v. Regents of Univ. of Minnesota*, 534 U.S. 533, 534 (2002); *see Jinks*, 538 U.S. at 466. Here, Respondents' reading of § 630(b) would undeniably expand the liability of state agencies as well as political subdivisions, so this is a *Raygor* case, not a *Jinks* case. Moreover, the statute in *Jinks* merely extended the procedural window for existing causes of action. Here, Respondents' reading of the ADEA would substantively expand a federal cause of action, OB38, 56-57, a far more substantial intrusion on sovereignty.

Respondents' reliance on *EEOC v. Wyoming*, 460 U.S. 226 (1983), is similarly misplaced. RB37. *Wyoming* held that the Constitution does not prohibit Congress from extending ADEA coverage into the public sphere. *Id.* at 228-29. We agree. But that does not displace the separate rule that Congress must make its intent to do so unequivocally clear.

2. Our reading would also avoid constitutional concerns by ensuring that the ADEA's Commerce Clause hook—that covered employers must "affect[] commerce," § 630(b)—applies to private and public entities alike. OB40-42. The Government attempts to minimize this issue by suggesting that Congress "ordinarily" omits such a hook when "independently address[ing] public entities." GB28. But it cites

examples that prove otherwise: Both the FLSA and Family and Medical Leave Act expressly state that covered governmental entities are engaged in commerce. 29 U.S.C. §§ 203(s), 2611(4)(B). Reading the ADEA to omit such a statement would raise novel questions about the statute's constitutionality—a result this Court must avoid by endorsing the majority reading. OB41.

II. Applying The ADEA's Employee Minimum To Political Subdivisions Best Harmonizes The ADEA With Congress's Purpose And Other Antidiscrimination Statutes.

As our opening brief explains (at § II), Respondents' reading creates inexplicable rifts along several dimensions: (1) it yields different employee minimums for public and private employers, OB46-49; (2) it leaves public entities without Congress's customary statutory Commerce Clause hook, OB49-50; and (3) it eliminates respondeat superior liability completely for public entities, OB50-51. And in each respect, Respondents' reading would drive a wedge between the ADEA and its sister statutes, Title VII and the ADA. OB46-51. Respondents fail to explain how their reading "produces a substantive effect that is compatible with the rest of the law." *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004).

A. Respondents first contest the very premise that Congress's purpose in amending the ADEA was to eliminate—not create—disparities between public and private employers. RB22-24. They do not deny that Congress harbored—and achieved—that intention two years earlier when it amended Title VII. Nor

do they dispute that the bill's sponsor, Senator Bentsen, said the ADEA amendments—originally drafted at the same time as the Title VII amendments—replicated Title VII's aim. OB45.

Respondents deride reliance on Senator Bentsen's statements. RB23-24. Yet they ignore the Senate Special Committee on Aging's statement to the same effect: It is "difficult to see why one set of rules should apply to private industry and varying standards to government." Special S. Committee on Aging, 93d Cong., Improving the Age Discrimination Law 17 (Comm. Print. 1973); *see* OB45-46. Respondents do not dispute that this committee report is authoritative. In fact, they cite (RB23) another report of the same committee, and present *it* as authoritative.

As to that report, Respondents seize on a single sentence summarizing that the 1974 amendments "[e]xten[ded] coverage to Federal, State, and local governmental employees" and "broaden[ed] ... the Act to include private employers with 20 or more employees (instead of 25 as under prior law)." Special S. Committee on Aging, 94th Cong., Action on Aging Legislation in 93d Cong. 9 (Comm. Print. 1975). Respondents incorrectly label this a "contemporaneous report," RB23, but it actually is a post-enactment collection of rote summaries of legislation relevant to "older Americans," Special S. Committee on Aging, 94th Cong., *supra*, at 9. This hardly overrides the *actually* contemporaneous, specific, and substantive statements of the same Committee and Senator Bentsen that public-private parity was Congress's aim.

B. Respondents next dispute that Congress intended to harmonize the ADEA's employee minimum with its sister antidiscrimination statutes, Title VII and the ADA. Instead, they say, "the ADEA should track ... the FLSA," which "applies to political subdivisions regardless of size." RB26-27. But on the very same page, Respondents undermine this position with a concession: that "the ADEA's '*substantive*, antidiscrimination provisions' are modeled after Title VII." RB26 (quoting *McKennon v. Nashville Banner Publ'g Co.*, 513 U.S. 352, 357 (1995)) (emphasis added); *see* GB21.

Respondents claim that "the ADEA's *who*"—the "definitions" dictating which entities are covered—is not substantive. RB27. But "substantive law" generally means any law (including definitions) that "creates, defines, and regulates the rights, duties, and powers of parties." *Substantive Law*, Black's Law Dictionary (10th ed. 2014). Thus, a provision that imposes liability on small political subdivisions is substantive, making Title VII the appropriate comparator. Respondents do not cite a single authority suggesting that a statute directing who is prohibited from engaging in primary conduct is procedural.

Contrary to Respondents' view (RB26-27), § 626(b) of the ADEA, which incorporates by reference portions of the FLSA, only confirms that the rules governing "who" is covered are substantive. Section 626(b) adopts a classic substantive/procedural distinction. It provides that the ADEA "shall be *enforced* in accordance with the powers, remedies, and *procedures* provided in" three sections of the FLSA. 29 U.S.C. § 626(b) (emphasis added). That does not mean

that rules of "who" is covered "are drawn from the FLSA." RB27.

Even if the FLSA were the right comparator, it would not support Respondents' view that the ADEA applies different rules to public and private entities. True, Congress "extended the FLSA['s] [coverage] to 'public agenc[ies],' regardless of size." GB22 (quoting FLSA Amendments § 28, Pub. L. No. 93-259, 88 Stat. 74 (1974)); RB28. But the FLSA does not, and never did, include an employee minimum for *any* entity, public or private. 29 U.S.C. § 203(a), (d); *see* 29 U.S.C. § 203(a), (d) (1970). It thus accomplishes the same public-private parity as Title VII and the ADA. So Respondents' reading creates disharmony between the ADEA and every plausible comparator in federal law.

In another effort to justify the statutory anomalies, Respondents point to the "ADEA's own treatment of federal employers," noting that the "ADEA covers federal agencies irrespective of size." RB28 (citing 29 U.S.C. § 633a). But Title VII—which indisputably applies its employee minimum to States and political subdivisions—also applies no minimum to federal employers. 42 U.S.C. § 2000e-16. The reason for the distinction there, and here, is that a discrimination suit would not put a federal agency on the brink of extinction, the way it would for a small poli ical subdivisions or private business.

Finally, Respondents claim support from state antidiscrimination laws. They note that the laws of "[a] majority of [States] cover political subdivisions regardless of size." RB28-29 & n.6. But they acknowledge that half the States they cite have no

employee minimum for *any* type of employer, public or private. *Id.* They treat public and private employers the same. As for the small minority that treats public and private differently, all but one of these States at least applies the same minimums for all of their antidiscrimination laws—i.e., for discrimination on the basis of age, race, sex, and so forth. So Respondents' nationwide search only proves that their reading of the ADEA truly stands alone.

C. Respondents do not deny most of the disparities that their reading creates, confining themselves mainly to the argument that they do not matter. The exception is our assertion (OB50-51) that their reading eliminates vicarious liability for public employers. Respondents seem to concede that Congress could not have intended something so horribly anomalous. But their reading in fact creates an even bigger problem: It threatens to eliminate vicarious liability not just for public employers under the ADEA, but for *all* employers accused of *any* sort of discrimination.

Here is how: Respondents insist the agent clause does not (as we contend) codify vicarious liability, but instead establishes personal liability for independent contractors. That means all the circuits that have concluded that the agent clause codifies vicarious liability are wrong. Worse, that must mean that the nearly "identical[]" agent clauses in both Title VII, RB32, and the ADA have the same limited meaning, and do not support respondeat superior. That, in turn, must mean this Court was wrong in concluding that Title VII's version of the agent clause establishes respondeat superior. *See Burlington*, 524 U.S. at 754.

To avoid the mischief they create by narrowing the agent clause, Respondents try to smuggle respondeat superior liability back into the ADEA through the word "employer." RB34. They argue that "[a] lawsuit for [employment] discrimination is, in effect, a tort action," so Congress must have adopted "ordinary tort-related vicarious liability rules." *Id.* (citations and internal quotation marks omitted). But that doesn't work. Respondents have no answer to the point (OB31) that this Court has not imported respondeat superior liability into other statutorily defined torts, such as § 1983 and Title IX, that lack agent clauses. And their theory cannot be squared with *Burlington*, which made no mention of implicit tort principles and relied instead on Title VII's agent clause. Strive as they might, their anomaly persists.

This is all easily avoided. The better reading: When Congress used the word "agent" in these statutes it meant "agent." It thus used § 630(b)'s second sentence to codify principles of agency liability for all employers, public and private, in all three statutes. OB27-31, 50-51. No anomalies. No contortions. Just common usage, common sense, and a statute that works the way Congress intended.

III. The Ninth Circuit's Rule Threatens The Survival Of Small Political Subdivisions.

Respondents' reading could impose devastating costs on small political subdivisions—effects Congress could not have intended. OB § III; Br. of Nat'l Conf. of State Legislatures. Respondents' argument to the contrary boils down to a list of entities that may not be affected, based on the quiddities of their particular

States' laws. RB39-40. This ignores the plight of the thousands of entities that unquestionably *would* be affected by the ruling. The many States that *do* have employee minimums for political subdivisions, *see* OB38-39, have made the judgment that their political subdivisions—like small businesses—cannot bear the costs of a lawsuit. States are best equipped to make these decisions. Only our reading of § 630(b) preserves their flexibility to do so.

Finally, Respondents lob in the parting accusation that the Fire District seeks "a free pass under federal law to discriminate on the basis of age." RB40-41. But they ignore what Congress understood: Even the most baseless allegations of age discrimination impose crippling costs on small political subdivisions. The reality is that age discrimination complaints with "very few factual allegations" can still "m[e]et the low threshold of content demanded by Federal Rule of Civil Procedure 8." *Wooten v. McDonald Transit Assocs., Inc.*, 788 F.3d 490, 494 (5th Cir. 2015). In the ADEA—as in Title VII and the ADA—Congress made the eminently sensible judgment that a public entity that relies on local taxpayers and bake sales to supply critical services should not bear the costs of an unwarranted federal lawsuit.

CONCLUSION

For the reasons stated here and in the opening brief, this Court should reverse the judgment of the Court of Appeals.

Respectfully submitted,

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